IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO.3172 OF 2005

Paresh Purshottam Gor
an Indian Inhabitant,
aged 34 years, B-313,
Radha Nagar, Manpada Road
Dombivali (E), Pin-421201
Dist.Thane ..Petitioner

Vs.

1. State of Maharashtra
Through Secretary(Home)
Home Department,
Mantralaya, Mumbai-
400032

2. Smt.Neela Satyanarayana
Principal Secretary
(A & S)
Detaining Authority,
Home Department
(Special) Mantrayalaya,
Mumbai-400032

3. The Superintendent of
Prison, The Mumbai
Central Prison,
Arthur Road, Mumbai

4. The Superintendent of
Prison, Nasik Road
Central Prison, Nasik ..Respondents

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Mr.Naresh Kaushik with Mr.Yogesh Rohira
Advocate for Petitioner
Mr.D.S.Mhaispurkar A.P.P. for State

....

CORAM: D.G.DESHPANDE AND SMT.V.K.TAHILRAMANI,JJ.

DATE : APRIL 18,2006

ORAL JUDGMENT: (PER SMT. V.K.TAHILRAMANI,J):

1. Through this petition under Article 226 of the Constitution of India, the petitioner who is brother of the detenu, has impugned the order of detention dated 21.9.2005 passed by Respondent No.2, Principal Secretary (A & S) and detaining authority, Government of Maharashtra. By the said order, the detenu came to be detained under Section 3(1) of the COFEPOSA Act, 1974. The detenu came to be detained as the detaining authority was subjectively satisfied that he was involved in smuggling of goods and unless detained, the detenu was likely to continue to engage in aforesaid prejudicial activities in future also. The detention order along with grounds of detention were served on the detenu on 25.11.2005.

2. We have heard Mr.Naresh Kaushik, the learned counsel for the petitioner and Mr.D.S.Mhaispurkar,

learned A.P.P. for the State. In this petition although many grounds have been pleaded, learned counsel for the petitioner has pressed only few grounds. However, as the petition can be allowed only on the basis of one ground, we do not find it necessary to advert to the remaining grounds which have been raised by the learned counsel for the petitioner. The said ground is ground no.13(IX), which can briefly be stated as under:

. "That after receiving the show cause notice, the detenu filed application on 12.8.2005 for settlement before Settlement Commission under Section 127(h) of the Customs Act, the Settlement Commission can grant immunity from prosecution and penalty. It is a specific case of the petitioner that the application preferred by the detenu before the Settlement Commission is vital and material document, was not considered by the detaining authority nor was the copy of the same furnished to the detenu."

3. The learned counsel for the petitioner has submitted that the said document i.e. application filed by the detenu before the Settlement Commission was generated before the detention order was passed. The sponsoring authority was aware of this document. However, it appears that the said document was not placed before the detaining

authority nor was it considered by the detaining authority before being subjectively satisfied that it was necessary to issue the order of detention. Mr.Kaushik, learned counsel for the petitioner has submitted that an application of the detenu to the Settlement Commission is a vital document and hence, it ought to have been considered by the detaining authority. In support of this contention, he has placed reliance on the decision of the Apex Court in the case of **V.C.Mohan Vs. Union of India & Others; (2002) 3 Supreme Court Cases 451**. He has drawn our attention to the observations of the Supreme Court in para no.12 wherein it is observed that:

> . 12. We would like to record, however another more important feature at this juncture: on an application before the Settlement Commission under Section 127-B of the Customs Act filed by the detenu on 8.2.2001 the Settlement Commission on 15.2.2001 after hearing the applicants and the department was pleased to admit the applications of the detenu and passed an order directing the detenu to make payment of additional duty of Rs.11,56,803/- within 30 days from the date of receipt of the order. Apart therefrom, the Commission further observed that the Commission shall have the exclusive jurisdiction on the case of the detenu, in terms of Section 127-F(2) of the Customs Act, 1962 to exercise the powers and

> perform the functions of any officer of customs, to the exclusion of all other officers of customs and it is on this score that Mr.Mani contended that if we may say so, rightly, that both the application and the order of the Settlement Commission, Southern Bench, Chennai dated 15.2.2001 ought to have been placed before the detaining authority-- the records however depict otherwise neither the application nor the order passed thereon did see the light of the day before the detaining authority. There is no manner of doubt that the documents mentioned above are not only important but of definite impact in the matter of detention and having a bearing on to the issue. Under the circumstances, there thus stands a bounden obligation to place the same before the detaining authority for fair play and justice. The sponsoring authority conveniently kept to itself a very relevant material which could have tilted the scale before the detaining authority."

4. As far as this document i.e. application to the Settlement Commission by the detenu is concerned, we find that detaining authority has taken an absolutely contradictory stand. In its affidavit affirmed on 10.3.2006, the detaining authority has categorically stated that "the detenu had made application to the Settlement Commission on 12.8.2005 and the copy of the same was forwarded to me along with representation dated 12.8.2005. Therefore, I was aware that detenu had already approached the Settlement Commission". However, in

the additional affidavit affirmed by the detaining authority on 3.4.2006, the detaining authority has taken an absolutely diametrical stand. In the said affidavit, the detaining authority has stated as under:

> . " I state that in his representation dated 29.7.2005 the detenu had claimed the ownership of the imported goods. I state that thereafter the Advocate for the detenu had forwarded the representation dated 12.8.2005 wherein he has stated that after realising his mistake he had moved the Application before the Settlement Commission. Although in the said representation the Advocate for the detenu had stated that the copy of the Application made to the Settlement Commission is annexed with the said representation, however, copy of the application filed before the Settlement Commission was not annexed to the said representation."
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> [Emphasis supplied]

5. Thus, in the second affidavit, it is specifically stated that application of the detenu to the Settlement Commission was not annexed. In such case, it is apparent that application of the detenu before the Settlement Commission was not placed before the detaining authority and hence, was not considered by the detaining authority.

6. We have perused the said application preferred by the detenu before the Settlement Commission and from the averment in the said application, we find that in the facts and circumstances of this case, this is a vital and material document. From the stand taken by the detaining authority in its subsequent affidavit, it becomes apparent that the said document was not placed before the detaining authority and hence, as such, could not have been considered by the detaining authority.

7. Mr.Mhaispurkar, learned A.P.P. has submitted that the detenu had preferred a representation and copy of the said representation was placed before the detaining authority. He has stated that in the said representation, the detenu had referred to the fact that he had preferred application to the Settlement Commission. He has further stated that contents of the application of the detenu before the Settlement Commission were also reflected in the representation and hence, the detaining authority was aware of the application and the contentions of the detenu before the Settlement Commission. Mr.Mhaispurkar has submitted that if a

particular document is not placed before the detaining authority but the detaining authority is made aware of the gist of that document by way of another document, in such case, non-placement of such document before the detaining authority would not vitiate the subjective satisfaction of the detaining authority. Thus, Mr.Mhaispurkar contended that if from another document, the detaining authority had a clear idea of the contents of the earlier document or the detaining authority could gather this knowledge from the other documents placed before the detaining authority, non-placement of the said document, would not render the order of detention invalid. In support of his contention, Mr.Mhaispurkar has placed reliance on an unreported decision of this Court dated 13.6.2005 in **Criminal Writ Petition No.253 of 2005** in the case of **Hajra Ikram Chand Vs. The State of Maharashtra and Ors.** Mr.Mhaispurkar submitted that the contents of the application preferred by the detenu before the Settlement Commission were made known to the detaining authority or the detaining authority had knowledge of the contents of the said document through the contents of the representation preferred by the

detenu to the detaining authority. Thus, the subjective satisfaction of the detaining authority was not vitiated.

8. We have perused both the documents i.e. application made by the detenu before the Settlement Commission and the representation preferred by him before the detaining authority. We do not find that the contents of the two documents are more or less similar. In fact, there is some material and vital points which are mentioned in the application of the detenu to the Settlement Commission which are not mentioned in the representation of the detenu. Had the representation conveyed the import of the application preferred by the detenu before the Settlement Commission, we would have found much merit in the submission made by Mr.Mhaispurkar, however, after perusing both the documents, we find that the import of application of the detenu before the Settlement Commission, is not conveyed by the other document i.e. representation of the detenu to the detaining authority.

9. We have already observed earlier that in the

facts and circumstances of this case, the application of the detenu to the Settlement Commission was a vital and material document. From the affidavits filed by the detaining authority, it appears that the said document was not placed and was not considered by the detaining authority. In this view of the matter, in our opinion, the subjective satisfaction of the detaining authority is vitiated and hence, detention order deserves to be set aside.

10. In the result, the detention order dated 21.9.2005 is quashed and set aside. Rule made absolute.

[D.G.DESHPANDE, J.]

[SMT.V.K.TAHILRAMANI,J.]